Filed 8/20/04 In re B.R. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re B.R. et al., Persons Coming Under the Juvenile Court Law.	
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. CHRISTINA R., Defendant and Appellant.	C046190 (Super. Ct. Nos. JD218718, JD218719)

Christina R. (appellant), the mother of B.R. and S.B., appeals from the February 6, 2004 order of the juvenile court terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)[1] Appellant contends the evidence supported both the "benefit" and the "sibling" exceptions to the preference for adoption set forth in section 366.26, subdivisions (c)(1)(A) and (E). Appellant also argues the juvenile court failed to make a

[1] Undesignated statutory references are to the Welfare and Institutions Code.

determination as to the applicability of the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) and further failed to ensure the Sacramento County Department of Health and Human Services (DHHS) gave proper notice to the Indian tribes and the Bureau of Indian Affairs (BIA). As we conclude the ICWA notice was insufficient, we shall conditionally reverse the order terminating appellant's parental rights as to S.B. only and remand the matter to the juvenile court for additional notice to the relevant tribal entities. We shall affirm the order terminating appellant's parental rights as to B.R.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant has a history of referrals to child protective services, including when she tested positive for drugs when her son E.R. was born in October 1995. Five-year-old S.B. and one-month-old B.R. were placed into protective custody on October 23, 2002, after appellant failed to participate in the voluntary services she agreed to when she tested positive for methamphetamine and marijuana at the time of B.R.'s birth. Juvenile dependency petitions were filed on behalf of S.B. and B.R. (the children) two days later.

The detention report submitted by DHHS stated that the ICWA may apply to S.B. as her presumed father believes his family has Cherokee Indian ancestry. Her Indian heritage also might be with the Blackfeet Tribe. After the detention hearing, a paralegal with the DHHS attempted to contact S.B.'s father to

obtain any family or tribal information for the purpose of the ICWA notice. After leaving three messages for S.B.'s father and not receiving a return phone call, the paralegal on November 8, 2002, mailed only the "SOC 319" form with minimum information to the United Keetoowah Band of Cherokee, the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, the Blackfeet Tribe of Montana, and the BIA. The 319 form listed S.B.'s name, date of birth, and state of birth. It also listed her parents' names and dates of birth, but no birthplaces.

Based on the information provided, the three Cherokee tribes answered that S.B. was not a tribal member or eligible to become a member. The Blackfeet Tribe requested additional information, specifically the names of S.B.'s grandparents. Without those names, the tribe could not determine tribal membership. Nothing in the record indicates that DHHS responded to this request.

On November 25, 2002, DHHS filed its jurisdictional/dispositional report. According to the report, the social worker spoke to S.B.'s father on October 28, 2002. Part of the information S.B.'s father provided was the name of his mother and his father, i.e., S.B.'s paternal grandparents. Although the social worker had this information prior to the ICWA notice sent by the paralegal, he apparently never forwarded these names to the paralegal.

At the jurisdictional hearing on January 17, 2003, the juvenile court sustained the allegations that the children came

within the provisions of subdivisions (b) and (j) of section 300, and ordered reunification services be provided pursuant to section 361.5, subdivision (c), to both appellant and S.B.'s father.

The children were initially placed with appellant's mother, but removed when the grandmother's boyfriend did not qualify for a waiver based on his criminal conviction history. By the time of the six-month review, the minors were placed together in their third foster care home. The foster parents were interested in adopting the minors if reunification services failed. The social study report for the six-month review recommended termination of reunification services for both parents and the setting of a section 366.26 hearing. The report noted, as to appellant, that she had failed to complete two residential drug and alcohol treatment programs in the last six months, she continued to test positive for drugs, and she was currently incarcerated on a remand for Drug Court and a bad check charge.

After a contested review hearing on August 5, 2003, the juvenile court terminated reunification services and set a section 366.26 hearing.

In September 2003, appellant's mother, the children's grandmother (grandmother), wrote to the juvenile court expressing her concern about the placement of the minors. The grandmother noted that S.B. had lived with her for all but two months of her life prior to the birth of B.R. The grandmother

has had custody of appellant's son E.R. since his birth. The grandmother stated she had "strong maternal ties" to S.B. S.B. did not want to be adopted. S.B wanted to be with the grandmother and her family. The grandmother stated she had moved to Southern California, severed all ties with her previous boyfriend, had a new job and wanted S.B. to be part of her life again. Appellant filed petitions pursuant to section 388 seeking placement of the children with grandmother based on these changes. The juvenile court denied the petitions after a contested evidentiary hearing on December 2, 2003.

Dr. Jayson Wilkenfield performed a psychological assessment of S.B.'s relationship to her foster parents, her father and appellant. Dr. Wilkenfield stated that S.B. was thoroughly comfortable in the presence of her foster parents. She called them "mommy" and "daddy." She spontaneously made physical contact with them and was receptive to their affection. She appeared to have a relatively strong emotional and psychological attachment to both of her foster parents.

Dr. Wilkenfield also observed appellant and S.B. S.B.'s mood appeared to brighten upon seeing appellant. She immediately approached appellant and climbed into her lap. She remained in close proximity to appellant during their entire visit. Dr. Wilkenfield opined that S.B. continues to have a strong emotional attachment to appellant. However, he was concerned with appellant's ability to provide an environment that would be conducive to S.B.'s healthy emotional and

personality development. He had observed appellant modeling a number of manipulative and rather passive-aggressive behaviors.

After observing S.B with both appellant and her foster parents, Dr. Wilkenfield felt that "severing the relationship between [S.B.] and [appellant] would likely result in a detriment to [S.B.'s] emotional functioning in the short term, but it was also apparent that she has developed a healthy emotional attachment to both her foster parents. [S.B] states a clear preference for being returned to her mother's care, but if [appellant] is unable to reunify with her, it appears that the foster parents are capable of providing the type of support and nurturance for her that would help to minimize the discomfort she would likely experience if the Court orders that [appellant's] rights over her be terminated." Dr. Wilkenfield further stated, "[w]hile [S.B.] would likely suffer an emotional detriment if her mother's rights are terminated, it would be my opinion that the well-being she could gain from the current placement being made permanent would help significantly to ease the discomfort she would experience . . . ."

The selection and implementation report stated that the ICWA does not apply. The report acknowledged that appellant had maintained consistent monthly visits with the children and the visits had gone well. The social worker had seen a definite bond between appellant and S.B. Phone contact had not gone as well, however, due to appellant's emotional inquiries, responses, and "coaching" of S.B. to state that she does not

want to be adopted. The report concluded that "although [S.B.] has some attachment to her biological mother, it is very likely that she can further develop a strong and healthy attachment to her current foster parents, who have committed to adopting both [S.B] and [B.R.]"

According to the selection and implementation report, the children had only one face-to-face contact with grandmother and their older brother E.R. during the previous few months. The foster family wanted to visit during the holidays but was told by appellant that they were not welcome.

At the 366.26 hearing appellant testified she had almost always lived with her mother (grandmother) and her grandmother (the children's great-grandmother). Appellant and S.B. moved out into an apartment for a few months before B.R. was born and the girls were detained. Otherwise S.B. had lived with her mother, grandmother and her brother E.R. all of her life. S.B. was happy when she saw E.R. They played together and S.B. acted pouty when she had to leave. S.B. told appellant she did not want to be adopted.

The grandmother testified at the 366.26 hearing that E.R. and S.B. were very close. They had lived together with her almost all of their lives. Appellant also lived with grandmother. When S.B. and B.R. were placed in foster care, grandmother had visits with them. S.B. and E.R. got together then. At the last visit, S.B. was kind of aloof to E.R. Grandmother thought S.B was trying to tease him and was more

interested in seeing her. S.B. was sad, but not too sad when they left. Grandmother understood the children's foster parents were agreeing to allow S.B. and E.R. to have a relationship in the future. Grandmother testified S.B. was "very, very close" to appellant. She never observed appellant try to manipulate the child. On cross-examination, grandmother agreed she was the primary caretaker of S.B. S.B. would go to her if she was hurt and needed comfort. Appellant and S.B. were like good friends.

E.R. testified that he and S.B. were friends. He knew S.B. loved him. S.B. cried when it was time to go.

The parties stipulated that S.B. would testify if she were called that she loved appellant, E.R., her grandmother, and her foster parents and foster siblings. She did not want to be adopted. She wants to continue seeing E.R., grandmother, and appellant.

The juvenile court found that even though there is a bond between S.B. and appellant, and there would be a benefit to continuing contact, it was "outweighed by the benefit that [S.B.] will obtain by having parental rights terminated and being allowed to remain in the foster home she's currently in and stabilized." As to the sibling exception, the juvenile court stated there was no evidence of such a substantial relationship with E.R. that termination of the relationship, if that happened, would be detrimental to S.B. There was substantial evidence that the relationship may be maintained because the foster parents and grandmother are willing to

maintain it. The juvenile court found by clear and convincing evidence that a permanent plan of adoption was appropriate. The court terminated appellant's parental rights as to both S.B. and B.R.

DISCUSSION

I. The Order Terminating Parental Rights

Appellant claims there was insufficient evidence to terminate her parental rights because the evidence supported a finding of both the benefit and sibling relationship exceptions. (§ 366.26, subd. (c)(1)(A) & (E).)[2]

A section 366.26 hearing "is designed to protect children's 'compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.'" (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.) Thus, "'[t]he permanent plan preferred by the Legislature is adoption.'" (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, italics omitted.)

If the court finds by clear and convincing evidence that a child is adoptable, the court must terminate parental rights and order the minor placed for adoption "absent circumstances under

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[2] Appellant is not, as respondent claims, precluded under section 366.26, subdivision (*l*)(2), from challenging the juvenile court's rejection of these adoption exceptions at the section 366.26 hearing. "[F]ailure to file a writ petition challenging an order setting a section 366.26 hearing does not affect the right to appeal matters arising at the section 366.26 hearing itself." (*Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399, 404.)

which it would be detrimental to the child." (*In re Ronell A., supra,* 44 Cal.App.4th at p. 1368.) There are only limited circumstances that permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1).) It is the parent's burden to establish an exception to termination of parental rights. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809; see also Evid. Code, § 500; Cal. Rules of Court, rule 1463(d)(3).)

On appeal, the juvenile court's ruling declining to find an exception to termination of parental rights must be affirmed if it is supported by substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; *In re Zachary G., supra*, 77 Cal.App.4th at p. 809; *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 955; cf. *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1342, 1351 [applying abuse of discretion standard].) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

A. The "Benefit" Exception

One of the circumstances under which termination of parental rights would be detrimental to the child is: "The parents . . . have maintained regular visitation and contact

with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).)

Appellant claims it is undisputed that "she consistently visited her children, and that continued contact between she [*sic*] and her children would be beneficial to her children." She contends "[a]ll that is relevant under section 366.26, subdivision (c)(1)(A) is whether or not continued contact would be beneficial to the children, . . . and the evidence proved it would." Appellant argues the juvenile court violated her constitutional right to due process by adding a "balancing test" to the statute; requiring appellant to prove the benefit of her relationship with S.B. outweighed the benefit to S.B. of being in the foster home. We disagree with appellant's analysis.

In arguing that she only had to show regular visitation and benefit from continued contact to establish the exception, appellant's argument is similar to the argument made and rejected in *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1417-1418. As that court stated: "Although the kind of parent/child relationship which must exist in order to trigger the application of section 366.26, subdivision (c)(1)(A) is not defined in the statute, it must be sufficiently strong that the child would suffer detriment from its termination." (*Id.* at p. 1418.) The court then went on to agree with the analysis of the court in *In re Autumn H., supra,* 27 Cal.App.4th at page 575, that "'[i]n the context of the dependency scheme prescribed by the Legislature, we interpret the "benefit from continuing the

[parent/child] relationship" exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.'" (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.)

We agree with this analysis as well. The juvenile court did not violate appellant's constitutional right to due process by adding a balancing test to the language of the statute. Rather, a balancing test was contemplated by the Legislature in section 366.26, subdivision (c)(1)(A).

In this case, the evidence showed that appellant consistently visited her children, although Dr. Wilkenfield expressed some concern about appellant's ability to provide an environment that would be conducive to S.B.'s healthy emotional and personality development. Appellant had been observed emotionally manipulating S.B. and coaching her to say she did not want to be adopted.

The evidence did show S.B. had a strong emotional attachment to appellant. However, it is not clear that S.B. was

attached to appellant *as a parent*. S.B. had lived with appellant in grandmother's home for most of her life. She looked to the grandmother as her primary caretaker, to whom she would turn for help and comfort when needed. Grandmother described herself as having "strong maternal ties" to S.B. Appellant was really just a good friend. B.R. was taken from appellant one month after her birth and lived either with grandmother or in foster care from that time.

The evidence also showed S.B. had formed a relatively strong emotional and psychological attachment to both of her foster parents. She called them "mommy" and "daddy."[3] Essentially, Dr. Wilkenfield believed that the emotional detriment S.B. would suffer if appellant's parental rights were terminated would be temporary because of the available support from her foster parents.

On this record, we conclude substantial evidence supported the juvenile court's finding that the benefit of a permanent home outweighed the benefit of continued contact with appellant.

B. The "Sibling Relationship" Exception

An exception to adoption applies if, as a result of the termination of parental rights, "[t]here would be substantial interference with a child's sibling relationship, taking into

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[3] Appellant argues on appeal this evidence is not significant because S.B. might call her foster parents "mommy" and "daddy" because the foster parents requested her to do so or because her foster siblings did so. Appellant did not present any evidence to support her position to the juvenile court.

consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).)

The first step for the juvenile court in evaluating whether this exception applies is to consider whether terminating parental rights would cause interference with a sibling relationship. (*In re L. Y. L., supra,* 101 Cal.App.4th at pp. 951-952.) "To show a substantial interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child." (*Id.* at p. 952.)

If the court determines that the child would suffer detriment if the sibling relationship is severed, the court then must weigh the benefit to the child of continuing the relationship against "the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E); *In re L. Y. L., supra*, 101 Cal.App.4th at pp. 952-953.) "The court must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of

security and belonging adoption and a new home would confer." (*In re L. Y. L., supra,* at p. 951.)

In this case, the juvenile court rejected the sibling relationship exception, stating there was not evidence of such a substantial relationship with E.R. that termination of the relationship, if that happened, would be detrimental to S.B. The juvenile court also found the relationship may be maintained because the foster parents and grandmother are willing to maintain it. Substantial evidence supports the juvenile court's ruling rejecting the exception.

The evidence established that S.B. and E.R. had lived together in the grandmother's home for most of their lives. They were part of the extended family living there. They were clearly playmates. They loved each other. However, grandmother also testified S.B. was more interested in seeing her than E.R. at the last visit. S.B. was sad, but not too sad when they left. On these facts, the juvenile court reasonably concluded that the relationship between S.B. and E.R. was not so substantial that severance would be detrimental to S.B.

It is important to note E.R. does not live with appellant. A decision by the juvenile court not to terminate appellant's parental rights and so not move forward with adoption will not result in the children having a reasonable chance of being reunited with E.R. The juvenile court has already denied appellant's petition for modification seeking placement of the children with grandmother after her move to Southern California.

In addition, grandmother testified the children's foster parents were agreeing to allow S.B. and E.R. to have a relationship in the future. The implementation and selection report reflected the foster parents were making efforts to take the children to Southern California to visit grandmother and E.R. Thus, even if severance of the sibling relationship would be detrimental to S.B., the uncertain chance of detriment would be outweighed by the sure benefit of legal permanence through adoption. (*In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1018-1019.)

Appellant nevertheless argues "[g]uardianship or long-term foster care would provide the vehicle that would assure that the children maintained contact with [E.R.]" The Legislature has decreed, however, that neither guardianship nor foster care is in the best interests of children who cannot be returned to their parents. "These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them." (*In re Beatrice M., supra,* 29 Cal.App.4th at p. 1419; *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251.)

II. ICWA Notice

In 1978, Congress passed the ICWA, which is designed to promote the stability and security of Indian tribes and families. The ICWA establishes minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the

unique values of Indian culture, and [provides] for assistance to Indian tribes in the operation of child and family service programs." (25 U.S.C. § 1902; *Mississippi Choctaw v. Holyfield* (1989) 490 U.S. 30 [104 L.Ed.2d 29].)

Under the ICWA, when a juvenile court in a dependency proceeding "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent to the tribe or the BIA if the tribal affiliation is not known. (25 U.S.C. § 1912(a); Cal. Rules of Court, rule 1439(f).)

The ICWA notice must include the following information, if known: the name of the child; the child's birth date and birthplace; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names of the child's mother, father, *grandparents* and great grandparents or Indian custodians, including maiden, married and former names or aliases, as well as their birth dates, places of birth and death, tribal enrollment numbers, and current and former addresses; and a copy of the petition. (25 C.F.R. § 23.11(a) & (d); 25 U.S.C. § 1952, emphasis added.)

Here the social worker obtained the names of S.B.'s paternal grandparents before the ICWA notices were sent by the DHHS paralegal, but inexplicably failed to provide those names to the paralegal. The ICWA notices were sent by the paralegal without such information. There is no indication in the record

that the grandparents' names were later sent to the tribes even when the Blackfeet Tribe specifically requested them.

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470.) Where all known genealogical information is not provided to assist the tribes in making this determination, the tribes are deprived of any meaningful opportunity to determine whether the minors are Indian children. (*In re D. T.* (2003) 113 Cal.App.4th 1449, 1454-1455.) The error is prejudicial requiring reversal. (*Id.* at p. 1455.)

DISPOSITION

The order terminating appellant's parental rights as to B.R. is affirmed.

The order terminating appellant's parental rights as to S.B. is vacated, and the matter is remanded to the juvenile court with directions to order DHHS to make proper inquiry and to comply with the notice provisions of the ICWA. If after proper inquiry and notice, the BIA or a tribe determines that S.B. is an Indian child as defined by the ICWA, the juvenile court is ordered to conduct a new section 366.26 hearing in conformity with all provisions of the ICWA. If, on the other hand, no response is received or the tribes and the BIA determine that S.B is not an Indian child, all previous findings

and the order terminating appellant's parental rights as to S.B. shall be reinstated.

BUTZ, J.

We concur:

SIMS, Acting P. J.

RAYE, J.